IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.584 OF 2004
IN
NOTICE OF MOTION NO.211 OF 2003
IN
INSOLVENCY NOTICE NO.N/45 OF 2003

Rajesh Ranka .. Appellant

v/s.

M/s.Manipal Finance Corporation Ltd...Respondent

Mr.Shyam Diwan with Mr.Burjis Kolabawala and Mr.Ajit Anekar and Mr.Karthik Somasundram i/by M/s.Paras Kuhad & Associates for appellant.

Mr.Kishor Jain with Mr.Tushar Goradia for respondent.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 27th October, 2004

P.C.

Admit.

2. Mr.Kishor Jain, the learned counsel for the respondent waives service.

3. By consent of the learned counsel for the parties, appeal is treated on board for final hearing.

4. We heard the learned counsel for the parties and perused the impugned order and the available material.

5. The present appellant has suffered the

arbitration award and is the judgment debtor.. The respondent herein being the judgment creditor served notice under section 9(2) of the Presidency Towns Insolvency Act, 1909 (for short, 'Act of 1909') to the appellant for the execution of the arbitration award. The appellant took out notice of motion No.211 of 2003 on 1.12.2003 challenging the notice under section 9(2) of the Act of 1909. The said notice of motion appeared on board on 6th April, 2004 but since nobody appeared for the appellant, the said notice of motion came to be dismissed in default. On 22.6.2004, the appellant took out notice of motion being notice of motion No.124 of 2004 for restoration of the earlier notice of motion No.211 of 2003. By the impugned order dated August 3, 2004, the said notice of motion No.124 of 2004 has been dismissed giving rise to the present appeal.

6. The learned Judge considered the matter thus-

> "1. The notice was based on the award in favour of the judgement creditor. There is no stay. In other words, the award is executable. Notice of motion taken out by the Judgment Debtor was dismissed for non-appearance of advocate for Petitioners. The contention advanced is that the clerk made mistake in noting the matter. On the other hand on behalf of the Judgement Creditor, it is pointed out that they have already filed petition subsequent to dismissal of the motion for setting aside the notice.
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> 2. Considering the above facts, no case made out for recalling the order of dismissal. Motion dismissed."

7. It is not in dispute that the learned Judge has power to recall the order dismissing the notice of motion in default. The procedure provided in the Code of Civil Procedure as far as possible is made applicable to the insolvency proceedings by virtue of Section 90. Section 90 of Act of 1909 provides that the court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction. It would be, thus, seen that the procedure provided under Order 9 Rule 9 CPC as far as possible without being inconsistent with the Act of 1909 is applicable. In the application made by the appellant for restoration the learned single Judge was required to consider whether the delay in making the application was sufficiently explained and that there was sufficient cause for non-appearance. From the impugned order, it does not appear that the learned Single Judge at all considered the matter in the light of the legal position noticed above. Save and except noticing the contention of the judgment debtor (appellant herein) that the clerk of the advocate committed mistake in noting the matter and the contention of the judgment creditor that the judgment creditor has already filed petition, there is no consideration of the matter by the learned single

Judge. Confronted with this difficulty, the learned counsel for the judgment creditor suggested that matter may be remitted to the learned single Judge for reconsideration.

8. We, accordingly, allow the appeal; set aside the order dated August 3, 2004 and remit the notice of motion No.124 of 2004 in notice of motion No.211 of 2003 in Insolvency Notice No.N/45 of 2003 for fresh consideration in accordance with law. No costs.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)